

Roslan bin Sabu @ Omar v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO R-05-89 OF 2003

DENIS ONG, MOHD GHAZALI AND JAMES FOONG JJCA
16 MARCH 2006

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Criminal Law — Dangerous drugs — Trafficking — Whether there was direct proof or inference that the accused knew what he was carrying was illicit drug — Whether mere act of throwing away plastic bags that was later found to contain illicit drug does not necessarily imply that the accused has knowledge of what is contained therein — Whether appellant knew what he was carrying were illicit drugs — Dangerous Drugs Act 1952 ss 39B(1)(a) & 39B(2)

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On 4 February 1998, two police officers were patrolling on a motor cycle at a location known as Pos TS 10 Malaysian-Thai border near Padang Besar, Perlis. When they were close to gate TS 9/50 they came across the appellant who was carrying two transparent plastic bags, one in each hand. He was coming out from some bushes and walking towards the road. The police officers called out to him in a loud voice. Upon hearing this, the accused ran back to where he came from. On seeing this, the two police officers got down from the motor cycle and gave chase. In the course of escaping, the appellant threw away the two plastic bags that he was carrying into the bushes. The appellant was apprehended and the two plastic bags retrieved. The appellant was later charged with trafficking 1346.6g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act. He was found guilty by the High Court and was sentenced to death.

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Held, dismissing the appeal:

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- (1) The mere act of throwing away a container or bag that was later found to contain illicit drug does not necessarily imply that the accused has knowledge of what is contained therein. There must be direct proof or inference that the accused knew what he was carrying was illicit drug. Just because the accused took flight and threw away the bag containing the drug or the package of drug itself is insufficient to infer such knowledge. To successfully infer such knowledge in this kind of situation, there must only be one exclusive inference to this fact to the exclusion of other possibilities (see para 11).
- (2) The appellant knew what he was carrying in the two plastic bags were illicit drugs. The appellant could not have missed the glaring sight of the drugs since the plastic used to wrap them were transparent, and so were the two carrier bags. The appellant must have seen what he was carrying and this would be sufficient to satisfy the mens rea element of the appellant on possession: *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685 distinguished. This considered

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- A together with the appellant's act of throwing away the two bags and running off after the police had ordered him to stop can lead to only one inference: that the appellant knew what he was carrying were illicit drugs (see para 12).

[Bahasa Malaysia summary]

- B Pada 4 Februari 1998, dua pegawai polis sedang menunggang motorsikal di lokasi yang dikenali sebagai Pos TS 10 Sempadan Malaysia-Thai dekat Padang Besar, Perlis. Apabila mereka menghampiri pagar TS 9/50, mereka menjumpai perayu yang sedang membawa dua beg plastik yang lutsinar, satu di setiap tangan. Beliau sedang keluar
- C daripada kawasan belukar dan berjalan menuju ke jalan raya. Pegawai polis tersebut telah memanggilnya dalam suara yang kuat. Mendengar ini, tertuduh mula berlari ke arah beliau datang. Melihat ini, kedua-dua pegawai polis itu turun daripada motosikal dan mengejanya. Semasa melepaskan diri, perayu telah membuang kedua-dua beg plastik yang beliau bawa ke dalam kawasan belukar itu. Perayu telah
- D ditahan dan kedua-dua beg plastik itu dapat diambil semula. Perayu kemudian telah dituduh mengedar 1,346.6g kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 32b(2) Akta yang sama. Beliau didapati bersalah oleh Mahkamah Tinggi dan dijatuhkan hukuman mati.

- E **Diputuskan**, menolak rayuan tersebut:

- (1) Tindakan semata-mata membaling suatu bekas atau beg yang kemudiannya didapati mengandungi dadah haram tidak semestinya bererti bahawa tertuduh mempunyai pengetahuan apa yang terkandung dalamnya. Perlu ada bukti
- F secara langsung atau inferens bahawa tertuduh mengetahui apa yang beliau bawa itu adalah dadah yang diharamkan. Hanya kerana tertuduh lari dan membaling beg yang mengandungi dadah atau bungkusan dadah itu sendiri tidak mencukupi untuk membuat inferens adanya pengetahuan tersebut. Untuk berjaya membuat inferens tentang pengetahuan sedemikian dalam
- G keadaan ini, hanya perlu ada satu inferens eksklusif berhubung fakta ini dan tiada kemungkinan lain (lihat perenggan 11).
- (2) Perayu mengetahui apa yang beliau bawa dalam dua beg plastik tu adalah dadah yang diharamkan. Perayu tidak mungkin tidak sedar itulah dadah memandangkan plastik yang membungkusnya adalah lutsinar, dan begitu juga
- H dua beg pembawa itu. Perayu semestinya telah melihat apa yang beliau bawa dan ini memadai untuk memenuhi elemen mens rea perayu berhubung pemilikan: *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685 dibeza. Ini diambilkira dengan tindakan perayu yang membaling dua beg itu dan melarikan diri setelah polis mengarahnya berhenti hanya boleh menunjukkan satu inferens: perayu mengetahui apa yang dibawanya itu adalah dadah yang
- I diharamkan (lihat perenggan 12).]

Notes

For cases on trafficking drugs under ss 39B(1)(a) and 39B(2) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 392–434.

Cases referred to

PP v Tan Tatt Eek [2005] 2 MLJ 685 (distd)
Taib bin Mohamad v PP [2002] 3 MLJ 476 (refd)

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Legislation referred to

Dangerous Drugs Act 1957 s 37(da)(vi)

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Appeal from: Criminal Trial No 45–02 of 2002 (High Court, Kangar)

Ravindran V Muthu (Jayabalan Nadarajan with him) (VM Ravi & Associates) for the appellant.

Meor Hashimi bin Abdul Hamid (Attorney General's Chambers) for the prosecution.

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James Foong JCA (delivering judgment of the court):

INTRODUCTION

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[1] The appellant was charged as follows:

Bahawa kamu pada 4 Februari 1998 jam lebih kurang 5.40 petang di pagar keselamatan berhampiran pintu TS 9/50, di dalam Daerah Kangar, di dalam Negeri Perlis, telah mengedar dadah berbahaya iaitu 1346.6g cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama.

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[2] He was found guilty as charged by the High Court at Kangar and was sentenced to death. He appealed to us. After hearing submissions from his counsel and that of the Deputy Prosecutor, we unanimously dismissed his appeal. Below are our grounds.

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FACTS

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[3] On 4 February 1998, at about 5.40pm, two police officers, SP5 and SP6, were patrolling on a motor cycle at a location known as Pos TS 10 Malaysian-Thai border near Padang Besar, Perlis. When they were close to gate TS 9/50 they came across the appellant who was carrying two transparent plastic bags, one in each hand. He was coming out from some bushes and walking towards the road. SP5 called out to him in a loud voice: 'Hai Mat, apa yang kamu buat di sana?'

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[4] Upon hearing this, the accused ran back to where he came from. On seeing this, SP 5 shouted, 'jangan lari kami polis' and got down from the motorcycle to give chase. In the course of escaping, SP5 and SP6 saw the appellant threw away the two plastic bags that he was carrying into the bushes. The appellant was apprehended and the two plastic bags retrieved by SP6. Inside each bag was a package of drugs wrapped

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- A in transparent plastic. The appellant was arrested and the drugs when later examined by the chemist from the Chemistry Department were found to be cannabis weighing 1346.6g.

ISSUE RAISED DURING APPEAL

- B [5] Though there are 12 grounds listed in the appellant's petition of appeal, his leading counsel, Mr Ravindran, informed us that the appellant would be relying only on ground number 6; the rest would be abandoned.

- C [6] Ground 6 in his petition of appeal reads:

Yang Arif Hakim terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa elemen minda pemilikan telah berjaya dibuktikan berdasarkan keterangan SP5 bahawa Perayu telah mencampakkan kedua-dua bungkusan tersebut semasa disergah dan cuba melarikan diri dan di samping itu plastik yang membaluti bahan tumbuhan tersebut adalah plastik lutsinar dan berwarna cerah.

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- E [7] To support this contention, Mr Ravindran first highlighted to us the relevant passage in the trial judge's grounds of judgment where he claimed to contain the erroneous finding by the trial judge on the appellant's, knowledge of the illicit drugs in the two plastic bags. This is at p 130 of the appeal record (p 11 of the alasan penghakiman) which reads;

- F Dari segi fizikal saya berpuashati berdasarkan keterangan SP5 bahawa kedua-dua bungkusan tersebut berada dalam tangan tertuduh dan pada mas a tersebut hanya tertuduh seorang sahaja berada di situ. Jelaslah bahawa kedua-dua bungkusan tersebut berada dalam kawalan atau jagaan tertuduh. Mengenai elemen minda atau pengetahuan pula saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan tertuduh mengetahui kandungan bungkusan tersebut. Ini berdasarkan keterangan SP5 bahawa tertuduh telah mencampak kedua-dua bungkusan tersebut semasa disergah oleh SP5 dan cuba melarikan diri. Di samping itu plastik yang membaluti bahan tumbuhan tersebut adalah plastik lutsinar dan berwarna cerah. Keterangan saksi-saksi pihak pendakwa jelas menunjukkan bahan tumbuhan dalam bungkusan plastik itu boleh dilihat dengan mata kasar. Keadaan ini juga boleh dilihat sendiri oleh mahkamah dalam gambar yang dikemukakan oleh pihak pendakwaan iaitu P6A-F.

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- H [8] According to Mr Ravindran, this finding is contrary to the principle laid down in the recent Federal Court case of *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685 which says:

- I In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the

respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). On the conduct of the respondent, the learned trial judge at p 133 of the appeal record *jilid* II had this to say:

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The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

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So, how much support do the facts of dropping and being in a state of shock lend the appellant in his submission that the court should infer from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105 at p 108 Spenser Wilkinson J said:

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... where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

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Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of “dropping and being in a state of shock” without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the present case.

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[9] To fortify his claim that the act of throwing away the two plastic bags as well as running off when told to stop by the police do not necessarily imply that the appellant has knowledge of the contents therein, Mr Ravindran highlighted two more cases decided by this court. The first is *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223 where Abdul Kadir Sulaiman JCA (as he then was) declared (at pp 229–230):

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The appellant’s action in running away when confronted, and at the same time throwing away the plastic bag can be inferred that the appellant had the knowledge that the plastic bag contained the dangerous drug. By running away it shows that the appellant had the knowledge in regard to the drug in the plastic bag. By throwing away the plastic bag, the appellant wanted to part with possession of the drug.

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But in our view, just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform. In *Toh Su Kuan v PP* [2005] 3 CLJ 740 where the circumstances were very much stronger against the accused in that case than those in the present case but this court held that they were insufficient to constitute proof possession of the very drug stipulated in the charge. The accused in that case was charged with the capital offence of trafficking in 1,584.93g of heroin and was sentenced to death in the High Court. The evidence for the prosecution was that the drug was found in 356 packets in different parts of the accused’s

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- A person: 62 packets in the left shoe, 60 packets in the right shoe, 57 packets strapped to the left shin, another 57 packets strapped to the right shin, 60 packets tied to the waist in front and 60 packets fastened to the waist at the back ...
- ... By the operation of our Dangerous Drugs Act 1952, in relation to the charge, it is necessary for the prosecution to prove directly or inferentially that the appellant had the knowledge of the nature of the dangerous drug he was carrying in the plastic bag.
- B Knowledge in a person is a thing which cannot be seen or perceived. It can be deduced only from the overt act or conduct short of his own admission. The legislature in its wisdom, realizing the difficulty of establishing by direct evidence of this fact of knowledge, introduced a statutory presumption which is rebuttable, by way of s 37 (d) of the Act.
- C [10] The second authority is *Taib bin Mohamad v Public Prosecutor* [2002] 3 MLJ 476 where KC Vohrah JCA has this to say:
- the mere throwing of the bag without more cannot constitute knowledge of the contents of the bag. To our mind his throwing of the bag, even if true, does not unequivocally show guilt bearing in mind what was stated in *Abdullah Zawawi bin Yusof v PP* [1993] 3 MLJ 1 by the Supreme Court:
- D The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly act in that way.
- E There being no evidence from which his knowledge of the drugs could be inferred, the learned judge could not and should not have called the accused to make his defence on the charge of trafficking but the accused, because of the presumption of knowledge of the drug raised under s 37(d) could be called upon his defence on a charge of possession of the cannabis.
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- G [11] We are of the view that the principles of law deduced from the above authorities are these: The mere act of throwing away a container or bag that was later found to contain illicit drug does not necessarily imply that the accused has knowledge of what is contained therein. There must be direct proof or inference that the accused knew what he was carrying was illicit drug. Just because the accused took flight and threw away the bag containing the drug or the package of drug itself is insufficient to infer such knowledge. To successfully infer such knowledge in this kind of situation, there must only be one exclusive inference to this fact to the exclusion of other possibilities.
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- I [12] Applying these principles to the facts of our instant case, we are firm in our conviction that, from the evidence as presented, there can be only one inference: the appellant knew what he was carrying in the two plastic bags were illicit drugs. The appellant could not have missed the glaring sight of the drugs since the plastic used to wrap them were transparent, and so were the two carrier bags. The appellant must have seen what he was carrying and this would be sufficient to satisfy the *mens rea* element of the appellant on possession. The factual matrix in this case is quite unlike those in *PP v Tan Tatt Eek* where the plastic bag was orange in colour and in *Taib Mohamad v PP*, the plastic bag containing the drugs was not only black but the

drugs were also wrapped with brown tapes. In those situations, we agree that there is a likelihood that the accused may not know the contents in the bag he was carrying because the strong colour of the bag or the wrapper may conceal the identity of the drug. For this reason, as gathered from the cases cited, the accused should be accorded the benefit of the doubt that he has no knowledge of what he was carrying. But in our case, the appellant could not have shut his eyes to what was obvious. The contents could be seen right through both the plastic bags and the plastic wrappers. They were so transparent that any reasonable person carrying them must have known what was inside. This is what Professor Glanville Williams in his text, *Textbook on Criminal Law* at p 125 called 'wilful blindness', when he said:

... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately "shuts his eyes" to the obvious, because he 'doesn't want to know,' he is taken to know.

[13] We are of the view that this considered together with the appellant's act of throwing away the two bags and running off after the police had ordered him to stop can lead to only one inference: that the appellant knew what he was carrying were illicit drugs. With this, we are in full agreement with the finding of the trial Judge that the appellant had possession of the said drugs and is presumed to be a trafficker by virtue of s 37(da)(vi) of the Dangerous Drugs Act 1957, and when this presumption was not rebutted by the appellant, then the appellant must be guilty of the offence charged.

[14] For these reasons, we dismissed the appellant's appeal.

Appeal dismissed.

Reported by Peter Ling

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